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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JUAN RUBEN GARCIA,

Plaintiff and Appellant,

v.

MORTGAGE INVESTORS  
CORPORATION et al.,

Defendants and Respondents.

B175195

(Super. Ct. No. BC 309405)

APPEAL from a judgment of the Superior Court of Los Angeles County.

David A. Workman, Judge. Reversed.

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Law Offices of Rob Hennig and Rob Hennig for Plaintiff and Appellant.

Foley & Lardner, Gail M. Blanchard-Saiger and Heather McNeill for Defendants  
and Respondents Mortgage Investors Corporation, Michael Lehman and Kent Wilkes.

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Plaintiff Juan Ruben Garcia applied for a job with defendant Mortgage Investors Corporation (MIC) on October 30, 2002. He was hired that day and fired on June 27, 2003. Among the documents in the new-employee package he received were a “Draw and Advance Agreement for Loan Officers” (D&A Agreement) and an “Agreement to Settle all Employment Related Disputes by Arbitration” (Arbitration Agreement). He signed the two agreements on the day he was hired or shortly thereafter.

Following his termination, Garcia filed a lawsuit seeking damages from MIC. Garcia’s first amended complaint added as defendants two of his former co-workers, Michael Lehman and Kent Wilkes, and alleged several causes of action.<sup>1</sup> The defendants filed a motion to dismiss based on a forum selection clause in the D&A Agreement which provided for venue in Florida. The trial court granted defendants’ motion, dismissing his first amended complaint without prejudice to Garcia’s filing a lawsuit in Florida. Garcia filed a notice of appeal.<sup>2</sup> We reverse.

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<sup>1</sup> Garcia’s first amended complaint set out claims for discrimination by MIC on the basis of physical disability, national origin or ancestry, and sexual orientation, respectively (Gov. Code, § 12940, subd. (a)). His fourth cause of action alleged unlawful disclosure by MIC of medical information (Civ. Code, §§ 56.20, 56.245). Garcia’s fifth cause of action claimed invasion of privacy by all defendants (Cal. Const., art. I, § 1). His sixth cause of action alleged intentional interference with prospective economic advantage against Lehman and Wilkes. His seventh cause of action alleged various violations by MIC of the wage and hour provisions of the Labor Code. His eighth cause of action alleged MIC breached the “partially written, partially oral, and partially implied” contract between him and the company that he would receive all bonuses he had earned while working for MIC. In his ninth cause of action, Garcia alleged that MIC’s foregoing violations constituted unlawful business practices (Bus. & Prof. Code, § section 17200).

<sup>2</sup> Garcia filed his notice of appeal on May 10, 2004, purportedly appealing from the “[j]udgment of dismissal under Code of Civil Procedure sections 410.31 and 418.10” “entered on” April 8, 2004. According to the superior court’s civil case summary, no order or judgment was entered that day; however, the summary also states the case was dismissed that day. A June 17, 2004, minute order notes the court’s approval of the attorney-prepared, formal order granting defendants’ motion to dismiss or stay. On the same day, the trial court signed and filed the order dismissing the action, an appealable order. In the interests of efficiency, we treat Garcia’s premature appeal as timely filed from the order of dismissal.

## BACKGROUND

The Steube Declaration. In support of defendants' motion, Rebecca Steube declared she was currently employed as a regional manager at MIC's headquarters in St. Petersburg, Florida. She had been Garcia's supervisor in California. Garcia was hired on October 30, 2002. On hiring, he "was provided a new employee package" containing a D&A Agreement. Steube had recently hired Wilkes for "a position" at MIC's St. Petersburg offices. Steube's declaration does not refer to the Arbitration Agreement.

The Garcia Declaration. Garcia's declaration in opposition to the motion stated he began work on October 30, 2002, within an hour of his hiring. As part of his hiring, he was given a stack of papers he was told to fill out and sign during training time. He was told he had to sign all the documents, "including the Arbitration Agreement and the [D&A] Agreement," or he could not work for MIC. He completed all the documents on Thursday, October 30, 2002, "or over the next few days" in between training sessions. He was told to date all forms October 30, 2002. It appeared to him as if he signed the Arbitration Agreement on November 2, and then tried to back date it to October 30, as he had been instructed. He thought the written date on the arbitration agreement looked as if it was dated October 2, 2002.

The Draw and Advance Agreement for Loan Officers. As noted, the D&A Agreement was entitled, "Draw and Advance Agreement for Loan Officers." The agreement addresses draws and advances, repayment of draws and advances, interest, remedies (for employee's unpaid balances of draws or advances), and default issues (for repayment of draws and advances).

The D&A Agreement also contains an "Integration and Modification" paragraph, which reads: "This Agreement and any 'Agreement and Receipt of Draw,' if any, are the complete and exclusive statement of the terms and conditions between me and the Company concerning its subject matter and supersedes and merges any prior understandings., representations, waivers or agreements, oral or written. . . ."

The last page of the D&A Agreement contains the forum selection clause:

“9. Legal Proceedings. This Agreement shall be governed by and construed under the laws of Florida. Any legal action under it, or any other action between me and the Company, shall only be brought in either the United States District Court for the Middle District of Florida, Tampa Division, or in the Circuit Court in and for Pinellas County, Florida (collectively called the “Authorized Courts”). For this purpose, I consent to personal jurisdiction in the Authorized Courts in any such action and waive[] any improper venue or forum non conveniens objection to the conduct of any proceeding in any such court. . . .” (Some caps. omitted.)

The Arbitration Agreement. The Arbitration Agreement was titled “Agreement to Settle all Employment Related Disputes by Arbitration.” That agreement read, “Mortgage Investors Corporation d/b/a AmeriGroup Mortgage Corporation (Employer) and applicant agree to settle by arbitration, before a single arbitrator, any and all controversies or disputes which may arise between applicant and Employer and/or any of Employer’s employees, officers, directors, or agents. This includes claims brought by Employer or against it, including, but not limited to claims brought under any federal, state, or local laws, such as, for example but not by way of limitation, harassment, discrimination or retaliation, wage and hour, wrongful discharge, tort and contract claims. This agreement does not prohibit applicant from retaining an attorney or from filing a claim or charge with any state or federal agency. . . .” The balance of the Arbitration Agreement consists of 11 provisos concerning arbitration.

Garcia’s First Amended Complaint. After his termination, Garcia filed a charge with the California Department of Fair Employment and Housing (DFEH). DFEH sent Garcia a right-to-sue letter. This lawsuit followed. (Gov. Code, § 12965, subd. (a))

## DISCUSSION

### I

In their motion to dismiss, defendants argued that California courts routinely enforce forum selection clauses in employment litigation cases and Garcia had the burden of demonstrating why the clause should not be enforced in this case. Defendants said Garcia could not carry his burden of demonstrating the forum selection clause was unreasonable and the clause should be enforced. Defendants further asserted that the forum selection clause covered the claims against Lehman and Wilkes.

Garcia opposed the motion on a variety of grounds, including his claim that the language of the Arbitration Agreement expressed the parties' intent that it -- and not the forum selection clause of the D&A Agreement -- be the guide for resolution of all employment disputes. Garcia also asserted that Wilkes and Lehman could not reasonably be considered third party beneficiaries of the forum selection clause.

Among his contentions on appeal, Garcia says the rules of contract interpretation appear to favor the Arbitration Agreement over the forum selection clause and that use of the forum selection clause should be narrowly construed to apply at most only to the D&A Agreement. We conclude that the Arbitration Agreement applies to Garcia's case.

Defendants brought their motion under Code of Civil Procedure sections 410.30 and 418.10. Section 410.30, subdivision (a) provides: "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just." Section 418.10 sets out the manner, including a motion to stay or dismiss the action on the ground of inconvenient forum, by which a defendant may contest jurisdiction and related procedures.

In connection with its resolution of defendants' motion, the trial court reviewed the "papers on file" and heard argument. As noted, in support of defendants' motion, Steube declared she had been Garcia's supervisor and that Garcia was hired on

October 30, 2002. On hiring, he “was provided a new employee package” containing a D&A Agreement.

Garcia’s declaration in opposition to the motion stated he began work on October 30, 2002, within an hour of his hiring. As part of his hiring, he was given a stack of papers he was told to fill out and sign during training time. He was told he had to sign all the documents, including the Arbitration Agreement and the D&A Agreement or he could not work for MIC. He completed all the documents on Thursday, October 30, 2002, “or over the next few days” in between training sessions. He was told to date all forms October 30, 2002.

“A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.” (Civ. Code, § 1636.) “The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.” (Civ. Code, § 1638.) “When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title.” (Civ. Code, § 1639.) “Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.” (Civ. Code, § 1642.) “The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.” (Civ. Code, § 1644.)

We reject defendants’ claim that Garcia impermissibly raises on appeal arguments that he did not raise in the trial court. As Garcia points out, to counter defendants’ sole focus on the forum selection clause, he discussed both agreements in opposition to the motion and argued that MIC had bound itself not only by its actions but also under the specific language of the two contracts in using the Arbitration Agreement as the exclusive remedy for MIC’s employment disputes with him.

In any event, new legal theories may be raised on appeal. (*Yeap v. Leake* (1997) 60 Cal.App.4th 591, 599 [“[T]he appellate court has the discretion to consider a new issue on appeal where it involves a pure question of the application of law to undisputed facts.”]) In examining the declarations submitted by the parties, it is undisputed that both agreements were part of the employment package Garcia was given upon his hiring and that they were signed within, at most, three days of each other. Thus, it is appropriate to consider the two agreements together. (Civ. Code, § 1642.)

Where there is no conflict in the extrinsic evidence, we independently interpret written instruments. (*Parsons v. Bristol Development Company* (1965) 62 Cal.2d 861, 865-866; *Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1670 (*Brookwood*) [interpretation of arbitration agreement to determine whether it applied to a particular controversy].)<sup>3</sup>

Neither party presented any evidence to suggest the D&A Agreement and the Arbitration Agreement were not part of the same transaction: Garcia’s hiring and employment. However, the substance of the MIC-prepared D&A Agreement addresses only draws and advances, as its title suggests. It also contains an “Integration and Modification” provision which reads: “*This Agreement* and any ‘Agreement and Receipt of Draw,’ if any, are the complete and exclusive statement of the terms and conditions between me and the Company *concerning its subject matter* and supersedes and merges any prior understandings, representations, waivers or agreements, oral or written. . . .” (Italics added.) The words “its subject matter” refer back to “[t]his Agreement.” Thus,

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<sup>3</sup> Defendants quote *Brookwood* for the proposition that “[w]hether Civil Code section 1642 applies in a particular case is a question of fact for resolution by the trial court. [(*Brookwood*, *supra*,) 45 Cal.App.4th at [p.]1675.]” A more complete statement of the rule, however, is, “It is generally a factual question whether several documents were intended to govern the same transaction. [Citations.] However, ‘[i]nterpretation of a contract presents a question of law unless it depends on conflicting evidence, and an appellate court is not bound by a trial court’s interpretation which does not depend on the credibility of extrinsic evidence.’ [Citations.]” (*Boyd v. Oscar Fisher Co.* (1989) 210 Cal.App.3d 368, 378.)

this language expressly limits the D&A Agreement's applicability to matters concerning draws and advances.

In contrast, the Arbitration Agreement reads as an umbrella agreement. It is entitled "Agreement to Settle *all Employment Related Disputes* by Arbitration." (Italics added.) Its text describes the parties' agreement "to settle by arbitration, . . . *any and all controversies or disputes which may arise* between applicant and Employer and/or any of Employer's employees, officers, directors, or agents. This *includes claims brought by employer or against it, including, but not limited to, claims brought under any federal, state, or local laws, such as . . . harassment, discrimination or retaliation, wage and hour, wrongful discharge, tort and contract claims.*" (Italics added.)

The Arbitration Agreement further provides that all the parties to the agreement "are voluntarily, knowingly, and intelligently waiving their right to seek remedies *in court or other forums*, including the right to a judge or jury trial." (Italics added.) The agreement also provides that following arbitration, judgment on an award "may be entered and confirmed *by any court of competent jurisdiction.*"<sup>4</sup> (Italics added.) Accordingly, the Arbitration Agreement both contemplates application of "federal, state, or local laws" and does not limit geographically the arbitration which is to resolve "all employment related disputes."

The two agreements may be read together and reconciled, whereas focusing exclusively on the forum selection clause does serious damage to the Arbitration Agreement, in violation of basic tenets of contract interpretation. The substance of the D&A Agreement applies only to draws and commissions. The D&A Agreement thus modifies the Arbitration Agreement with respect to draws and commissions and leaves the Arbitration Agreement in effect with respect to all other employment-related matters.

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<sup>4</sup> Defendants contend, in part, that the forum selection clause should control because the Arbitration Agreement refers to "applicant" rather than "employee." We perceive no meaningful significance to the use of these words in light of the undisputed fact that Garcia was given both agreements upon his hiring.

This interpretation largely harmonizes and gives effect to the provisions of the two agreements MIC presented to Garcia.

Defendants contend that the forum selection clause should not be limited to the subject of draws and advances because the forum selection clause by its terms applies to “any legal action under [the D&A Agreement], or any other action between me and the Company.” This argument does not, however, address the pivotal difference in the substantive coverage of the two agreements. Indeed, defendants’ argument points out an internal uncertainty within the D&A Agreement. The balance of the agreement addresses draws and advances and by its terms limits the contents of the agreement to “the terms and conditions between me and the Company concerning [draws and advances] . . . .” The forum selection clause, in contrast, purports to cover any legal action between Garcia and MIC. The broadly-worded forum selection clause runs counter to the specificity of the balance of the D&A Agreement. We conclude the resulting incongruity must be attributed to and held against the drafter, MIC, under two tenets of contract interpretation. (Civ. Code, §§ 1652 [“Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract”], 1654 [“In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.”].) We follow these precepts and conclude that the Arbitration Agreement applies to this dispute. Accordingly, we reverse the ruling granting defendants’ motion to dismiss Garcia’s first amended complaint. We emphasize that in so ruling we do not address the enforceability of the Arbitration Agreement.

## II

Garcia also claims the trial court erred in dismissing the complaint as to Lehman and Wilkes pursuant to the forum selection clause because they were not parties to the D&A Agreement and because they were not parties ““so closely related to the contractual relationship”” between MIC and Garcia. (*Bancomer, S. A. v. Superior Court* (1996) 44

Cal.App.4th 1450, 1461 [to be entitled to enforce a forum selection clause, party seeking to enforce the clause “must show by specific conduct or express agreement that (1) it agreed to be bound by the terms of the . . . agreement, (2) the contracting parties intended the [party seeking enforcement] to benefit from the purchase agreement, or (3) there was sufficient evidence of a defined and intertwining business relationship with a contracting party.”]) Defendants contend otherwise. Our ruling in Part I moots this issue.

#### DISPOSITION

The judgment (June 17, 2004, order of dismissal) is reversed and the matter remanded for further proceedings. Garcia is awarded his costs on appeal.

NOT TO BE PUBLISHED.

SUZUKAWA, J.\*

We concur:

MALLANO, Acting P. J.

VOGEL, J.

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\* (Judge of the L. A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)